

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

BANKRUPTCY & WINDING-UP CAUSE 21 OF 1979

IN THE MATTER OF VELCO PROPERTIES (K) LTD

AND

IN THE MATTER OF COMPANIES ACT

JUDGMENT

The applying Creditor has petitioned the court in pursuance of the provisions of the Companies Act and under rule 32(2) of the companies (Winding Up) Rules for orders that

1. Abdul Haji R Arain, creditor owed Shs 120,000/- by the company he substituted as the Petitioner Creditor.
2. Costs of the application be costs in the cause.

There is an affidavit in support of the application.

Mr Oweggi for the applying creditor ----- that the company is unable to pay its debts. The court was referred to section 219 (e) of the Companies Act (the Act) and ----- to make an order Winding Up the Company.

Mr Omondi for the company stated that the original petition was withdrawn because the company was able to pay. The Applying Creditor knew that the company is paying its credits. Mr Omondi told the court that all the other creditors of the company have been paid except for one Mutunda and the Applying Creditor.

Case of *Re Company 1894, 2, Chancery Division* page 349 was cited in support of the contention that the Applying Creditor was actually putting pressure on the company to pay him.

Section 219 of the Act provides for the circumstances in which a company may be wound up by the court. One of such circumstances is inability to pay debts and section 220 of the Act ----- inability to pay debts.

The affidavit of the Applying creditor does not comply with section 220(a) of the Act under which a creditor is required to demand payment. So, it hasn't been proved that the company is unable to pay. I am fortified in this ----- by the affidavit in opposition wherein it is deponed inter alia that the Applying Creditor had not demanded payment. Also, there is affidavit evidence which wasn't even challenged that the company has paid all the other creditors, leaving just one – the Applying Creditor! True the court does not know how much was owed by the company. The relevant factor however is that the company has paid the other creditors. That is evidence that the company is not unable to pay its debts.

The Applying Creditor was substituted soon after the original petitioner withdrew, having been paid by a Director of the company. The apparent ----- on the Applying Creditor petition for Winding Up even before demanding would suggest that the real motive may be different. Mr Omondi's submission based on the decision in *In Re a Company, 2 ch 1894 page 349 at page 351* that the ----- and to pressurize the company to pay has considerable force. I yet would prefer to

rest my decision in this petition on the ground that demand having not been made, the court is unable to determine if the company is truly unable to pay its debts. It is trite law even in ordinary claims that demand must be made before proceeding to sue.

Section 222 of the Act gives the court under powers after hearing a winding-up petition. Having considered the matter, I decide to dismiss the petition.

No order as to costs.

Dated and delivered at NAIROBI THIS 25TH DAY OF June, 1980

J.O NYARANGI

JUDGE